No. 12027

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF FRANK K. SULLIVAN, Deceased, by FLOYD K. SULLIVAN, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER.

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PRELIMINARY STATEMENT.

The holdings and decision of the Tax Court in this case, if permitted to stand, would make new law which would not only work a severe injustice upon petitioner, but would provide a most unfortunate precedent not only in cases involving similar facts but in other situations. Already the Tax Court has seized upon its own opinion in this case as justifying the imposition of estate taxes where California community property was converted by spouses into tenancy in common property, *Estate of Edwin W. Rickenberg, Deceased,* (July 7, 1948) 11 T. C.—No. 1, and further extensions of the doctrines announced in the case now under review may be expected if the action of

the Tax Court should be sustained. In such event countless estates would be adversely affected, and opinions and concepts long held and acted upon by attorneys and other tax authorities after years of conscientious and capable study would be proved erroneous. The importance of the case can hardly be overestimated.

Apart from procedural statutes, only three sections of the Internal Revenue Code are involved, and these are printed in full in the appendix to this brief.

JURISDICTION.

Jurisdiction of Court of Appeals.

This is a proceeding instituted by the taxpayer (petitioner above-named) for review of a decision of The Tax Court of the United States.

Jurisdiction is conferred upon the Court of Appeals by the provisions of Sections 1141(a) and 1142 of the Internal Revenue Code. (26 U. S. C. A. Secs. 1141(a), 1142.)

The decision of the Tax Court was rendered on May 27, 1948. [Tr. 115, 2.] A petition for review of said decision, prepared and signed in accordance with the provisions of Rule 30 of the Rules of the above-entitled Court of Appeals, was filed with the Clerk of the Tax Court on August 2, 1948. [Tr. 116, 2.] A copy of said petition, with notice thereof, was duly served upon the Commissioner of Internal Revenue, respondent herein, as required by said Rule 30, and proof of such service was filed with the Clerk of the Tax Court on August 2, 1948. [Tr. 122, 2.] Thereafter, the Clerk of the Tax Court transmitted a typewritten copy of the record on review to the Clerk of the above-entitled Court, who re-

ceived and filed said record on August 23, 1948. [Tr. 210-211.] As authorized by said Rule 30, the record was prepared in accordance with the provisions of Rule 75 of the Federal Rules of Civil Procedure. (See: 28 U. S. C. A. foll. Sec. 723c, Rule 75.)

The return of the tax in respect of which the asserted liability arises was made to the Collector of Internal Revenue for the Sixth District of California. [Tr. 28, 91-92. See: 26 U. S. C. A. Sec. 1141(b)(1).]

Jurisdiction of the Tax Court.

Jurisdiction of the Tax Court was conferred by Sections 1101 and 871(a)(1) of the Internal Revenue Code. (26 U. S. C. A., Secs. 1101, 871(a)(1).)

The proceeding in the Tax Court was initiated by the filing, by the taxpayer, petitioner herein, of a petition for redetermination of a federal estate tax deficiency determined by the Commissioner of Internal Revenue. [Tr. 3, 1. See: 26 U. S. C. A., Sec. 871(a)(1).] Said petition was signed and verified as prescribed by Rule 6 of the Rules of Practice before The Tax Court of the United States, and contained proper allegations showing jurisdiction of the Tax Court, and other matters as required by said Rule 6. [Tr. 3.] A copy of the Commissioner's notice of deficiency was appended to said petition as required by said Rule. [Tr. 15.] Said petition, together with the answer of the Commissioner, constituted the only pleadings filed with the Tax Court in this matter. [Tr. 3, 25.] At the hearing before the Tax Court a written stipulation was filed wherein and whereby the parties agreed upon a portion of the facts involved in the proceeding. [Tr. 27, 2.] Subsequent to said hearing, the Tax Court made and filed its findings of fact and

opinion and rendered its decision as aforesaid. [Tr. 91, 115, 2.] The facts showing the jurisdiction of the Tax Court appear from the admitted averments of the petition, from said stipulation and from said findings of fact. It was alleged in paragraphs 1, 2 and 3 of the petition, in substance, and was admitted by the answer that the petitioner was an individual residing at Los Angeles, California; that he was formerly the executor of the Estate of Frank K. Sullivan, Deceased, and was the person to whom all the communications in respect to the estate of said deceased were directed by the Treasury Department; that decedent died on January 9, 1944; that probate of said estate had been concluded; that petitioner was discharged as such executor on June 4, 1945; that all of said estate had been distributed by decree of the Superior Court of the State of California in and for the County of Los Angeles; that the estate tax return (Form 706) for said estate was filed with the Collector for the Sixth District of California; that the applicable valuation date was the date of death of decedent; that the notice of deficiency was mailed to petitioner on August 15, 1946; and that the taxes in question were the estate taxes on said estate, and in particular the Commissioner's determination of said taxes which, according to said notice, disclosed a deficiency of $18,963.17 wthout application of the credit for state inheritance tax purposes in the amount of $460.75. [Tr. 3-4, 25.]

At the time of the death of Frank K. Sullivan (hereinafter sometimes called decedent) he was domiciled and resided in the State of California. [Tr. 33, 92.]

According to the federal estate tax return for said estate, the value of the gross estate of the decedent for basic tax purposes was $63,440.55, and allowable deductions for both basic estate tax and additional estate tax amounted to $105,728.22, resulting in an absence of estate tax liability. [Tr. 18, 92.]

Pursuant to the decree of distribution in said estate a life interest in the assets of the estate was distributed to Hattie B. Sullivan, widow of decedent, and the remainder interest in the estate was distributed to said Floyd K. Sullivan. Mrs. Sullivan died December 18, 1946, and thereupon said Floyd K. Sullivan became the owner of all of said assets. [Tr. 28, 100, 101.]

On November 12, 1947, said Floyd K. Sullivan, acting on behalf of decedent's estate, filed with The Tax Court of the United States a petition for redetermination of the asserted deficiency. [Tr. 3, 1.]

On December 2 and 3, 1947, a hearing was had on said petition before the Tax Court, the Honorable R. L. Disney, Judge Presiding. [Tr. 2.] The Court ordered and determined in its decision that there was a deficiency of $18,963.17 in estate tax, and the decision was entered on May 27, 1948. [Tr. 115, 2.] It is this decision which petitioner requests the Honorable Court of Appeals to review.

STATEMENT OF CASE, QUESTIONS INVOLVED AND MANNER IN WHICH QUESTIONS RAISED.

Statement of Case.

Frank K. Sullivan was born April 6, 1866, and died testate on January 9, 1944. He and Hattie B. Sullivan were married in Minneapolis, Minnesota, April 6, 1892, and remained husband and wife until the time of Mr. Sullivan's death. Mrs. Sullivan was born May 24, 1867. She survived her husband and died December 18, 1946. At the time of decedent's death and for about twenty-two years prior thereto decedent and his wife resided and were domiciled in California. Their California domicile was established in 1922. For many years before such domicile was established decedent and his wife resided and were domiciled in Minnesota. [Tr. 3, 6, 25, 26, 28, 33, 34, 65-67, 91, 92.]

For a long time before the spouses established their home in California, decedent owned and conducted a retail coal business in Minnesota. In 1918 he sold said business and received the sum of $100,000 therefor. Thereafter for all intents and purposes he retired from active business and invested the proceeds of the sale of said business in apartment houses and income property and in mortgages and trust deeds with various Los Angeles firms. During his residence in California he was not employed and he engaged in no business except that of looking after his investments. [Tr. 6, 7, 26, 33, 34, 92.] Petitioner concedes that the original source of all of the property involved here was the proceeds of the sale of decedent's coal business, and that under the laws of the State of Minnesota, decedent's wife had no interest in such proceeds. [See Tr. 113.]

It was conceded by both parties to the proceeding before the Tax Court and in effect stipulated, that none of the properties involved constituted community property of the spouses. [Tr. 32-33, 113-114.] Under the laws of the State of California, none of the property could have been owned or held by the spouses as tenants by the entirety.

Swan v. Walden (1909), 156 Cal. 195, 133 Pac. 931.

Values of all property involved in the case were agreed upon by written stipulation filed in the Tax Court. [Tr. 29.]

On and immediately prior to November 19, 1943, decedent owned or had an interest in certain bearer bonds, and certain shares of stock which, on said date, were given by the decedent and his wife to Floyd K. Sullivan, their 44-year old son. The aggregate value of these securities was $33,526.54, as of the date of decedent's death. At the time of the gifts the following securities, having the values shown were held of record in the name of decedent alone [Tr. 29-30, 32-33, 38-39, 40-42, 93, 95]:

	Description	*Value*
2,500	shares Harris Mfg. Co.	$4,687.50
125	shares Pacific-American Investors preferred stock	2,312.50
1,150	shares Pacific-American Investors, Inc., common stock	2,156.25
100	shares Pacific Intermountain Express Co. preferred stock	1,000.00
10	shares W. B. Coon Co. preferred stock	1,050.00
25	shares Bank of America common stock	1,134.38
	Total	$12,340.63

It was alleged in the petition for redetermination of the asserted deficiency and was denied in the answer that, at the time of the gifts to their son, decedent and his wife owned and held all of the donated securities as joint tenants, in equal undivided shares and interests constituting separate property of the respective donors. [Tr. 5, 25-27.] It was established by stipulation filed in the Tax Court that all of said securities except those standing in the name of the decedent alone, were owned and held by the decedent and his wife as joint tenants at and immediately prior to the time of the gifts, and that the securities then standing in the name of the decedent alone were either jointly owned and held by him and his wife at said time or were then owned by him only. [Tr. 32-33.] It was and is, therefore, an undisputed fact in the case that donated securities of the aggregate value of at least $21,-185.91 were owned by the donors as joint tenants at and immediately before the time the gifts were made. The Tax Court failed to make any finding of fact upon the issue as to the ownership of any of the securities at the time of the gifts, and although the stipulation settled the question as to all of the donated property except securities aggregating $12,340.63 standing in the name of the decedent alone, the findings are silent as to the ownership of the last-mentioned securities at said time. It was, however, established by undisputed evidence that all of the donated securities, including those held in the name of decedent alone, were owned by the spouses as joint tenants at and immediately prior to the time the gifts were made. [Tr. 19, 125-126.]

The Tax Court also failed to make findings of fact that only an undivided one-half interest in the joint tenancy securities given to Floyd K. Sullivan was transferred by

decedent, and that the value of such interest did not exceed $16,763.27 (or in any event did not exceed $22,933.59), and that none of the property transferred by either spouse to their son was transferred in contemplation of decedent's death.

No part of the value of any of the donated securities was included by the executor, in the estate tax return, as a part of the value of decedent's gross estate. [Tr. 32, 96.]

In his notice of deficiency respondent included the entire value, to wit, $33,526.54, of the donated securities, in decedent's gross estate as property transferred by the decedent in contemplation of his death under the provisions of Internal Revenue Code, Section 811(c). [Tr. 17, 29-30, 96.]

The Tax Court found as a fact that the transfers made to Floyd K. Sullivan were made in contemplation of death, and held the entire value of the donated securities ($33,526.54) includible in decedent's gross estate and that petitioner had failed to establish error in the respondent's determination with respect to said transfers. [Tr. 101, 103-105, 107, 114.] The Court then, by its decision, confirmed the asserted deficiency. [Tr. 115.] Peculiarly the Court ultimately justified the inclusion of the entire value of the gifts in the gross estate not on the statutory ground asserted and relied on by respondent, namely, Internal Revenue Code, Section 811(c), but on the ground the property was so includible as jointly held property under Internal Revenue Code, Section 811(e)(1). [Tr. 112, 114.]

Petitioner contends, with reference to the gifts and transfers to Floyd K. Sullivan that: The findings of fact made by the Tax Court are contrary to the evidence as

stated in paragraph (1) of the Specification of Errors contained herein, and are deficient in the particulars stated in each of paragraphs (2) through (8), of said Specification of Errors; the conclusions and holdings of the Tax Court as set forth in its opinion were and are erroneous and deficient as stated in each of paragraphs (9) through (13) of said Specification of Errors; and the decision is not in accordance with and is contrary to law as stated in each of paragraphs (13), (14), (35) and (36) of said Specification of Errors. Petitioner's contentions in this connection are summarized in the statement of Questions Involved, hereinafter set forth. Petitioner contends that each and all of said questions should be answered in the affirmative.

On November 24, 1943, decedent and his wife, acting upon the suggestions of their attorney, made and entered into a written agreement affecting their property. A copy of the agreement was attached to the petition for redetermination of the asserted deficiency, and the original thereof was introduced in evidence in the hearing before the Tax Court. [Tr. 19, 188-189.] It was recited in said agreement, among other things, that the parties had, during their married life, accumulated certain real and personal properties, substantially all of which were then owned by them as joint tenants and that they desired to terminate all of such joint tenancies and divide all of said property between them to the end that each would own approximately one-half thereof as his or her separate property free and clear of all rights and claims of the other party. It was mutually agreed, in substance, that from and after the date of said agreement all of the real and personal property owned by the parties, whether then held in joint tenancy or owned by either of the parties in his or her name, should be owned by each of them as follows:

An undivided one-half interest therein should be the separate property of decedent and the remaining undivided one-half interest therein should be the separate property of his wife. By the provisions of the agreement each party assigned and transferred to the other party all of his or her right, title and interest in and to an undivided one-half interest in said properties. [Tr. 19-20.]

Included in the property affected by said agreement were four parcels of California real property, five promissory notes secured by deeds of trust on California real estate, six United States Savings Bonds, certain railway bonds and certain shares of the capital stock of three corporations. [Tr. 20-21, 97-98.] Certain furniture, fixtures and household goods, and a joint bank account held by the spouses were also affected by the agreement but not specifically referred to therein. [Tr. 20-24, 31-33, 98.]

At the time of the execution of said agreement, all of the property of decedent and his wife, and each of them, with the possible exception of one parcel of real property, was owned and held by decedent and his wife as joint tenants. Title to one parcel of real property (having a value of $1,500) stood in the name of decedent only. Decedent and his wife continued to own and hold all of said real property, bonds, promissory notes, shares of stock and furniture, fixtures and household goods until decedent's death. [Tr. 30-31, 32-33, 35, 99.]

Concurrently with the execution of the agreement decedent and his wife, as grantors, executed deeds purporting to convey the three parcels of real property standing in their names as joint tenants, to decedent, and decedent at the same time executed deeds purporting to convey an undivided one-half interest in each of said parcels to his wife. On the same day decedent executed a deed purport-

ing to convey an undivided one-half interest in the parcel of real property standing in his name alone, to his wife. At the same time assignments of the deeds of trust securing the five promissory notes were executed by decedent and his wife in favor of decedent, and assignments of an undivided one-half interest in each deed of trust was executed by decedent in favor of his wife. All of said deeds and assignments were recorded during the lifetime of decedent. The deeds and assignments were made for the purpose of effecting changes in the record title in conformity with the agreement. [Tr. 35-37, 31, 20-21, 68-90, 98.] Certain of the shares and bonds were not transferred of record until after decedent's death, and no record transfer was made of certain other shares or of the United States Savings Bonds, for reasons explained in the record. [Tr. 37, 22, 98-99.]

On December 20, 1943, $2,400 was withdrawn by decedent's wife from the bank account then standing in the names of the spouses, and deposited in her name in another bank. It was stipulated, in effect, that the account from which such withdrawal was made was in existence at and immediately prior to the time of the execution of the agreement dated November 24, 1943, and that decedent and his wife then owned and held the account as joint tenants. [Tr. 29, 32-33, 100.]

In the estate tax return the executor omitted from the decedent's gross estate one-half of the value of the bonds (including the United States Savings Bonds), one-half the value of the real property, shares of stock, promissory notes and furniture, fixtures and household goods covered by the agreement and the entire amount of the moneys withdrawn from the bank account by decedent's wife on December 20, 1943. [Tr. 99-100.]

In his notice of deficiency respondent reduced the returned value of the stocks and bonds included in the return by the amount of $140.20 and increased the deductions allowable by $64.20, thereby diminishing the value of the gross estate by $204.40. He then included in the gross estate, not only the entire value of the securities transferred to Floyd K. Sullivan ($33,526.54), but one-half of the adjusted value of the United States Savings Bonds (such one-half amounting to $25,013.80), one-half the value of the rest of the property covered by the agreement not including the bank account (such one-half amounting to $35,348.75), and the entire value ($2,400) of the moneys withdrawn from the bank account by decedent's wife prior to his death. [Tr. 29-32, 96, 99-100.] It appears from the notice of deficiency that these additions were made on the grounds that the gifts to Floyd K. Sullivan and the conversion of the properties of the spouses into tenancies in common by the agreement, and the withdrawal of the funds from the bank account were transfers in contemplation of death within Internal Revenue Code, Section 811(c), and that the value of the United States Savings Bonds was includible in the gross estate under said section and also as jointly held property under Section 811(e)(1) of the Code. [Tr. 18.]

Respondent determined that a deficiency of $18,502.42 existed all of which resulted from the foregoing additions to the value of the gross estate. [Tr. 28-29, 16-18, 91.]

It was alleged in substance in the petition for redetermination of the asserted deficiency, and denied in the answer, that all property acquired by decedent and his wife after the coal business was sold, was originally acquired and held by them as joint tenants with right of survivorship, and was thereafter owned and held by them as such

joint tenants until partitioned, divided and commuted, by the agreement of November 24, 1943, into property owned and held by them as tenants in common, and that, at the time of decedent's death, all of the property in which decedent or his wife had an interest was then owned and held by them as tenants in common and not as joint tenants, in equal undivided shares and interests, such shares and interests of decedent's wife then being her sole and separate property. [Tr. 7, 4-5, 8-9, 25-26.]

The Tax Court found as a fact, in accordance with the stipulation filed at the hearing, that prior to the execution of the agreement, all of the real estate (except the parcel of the value of $1,500 held in decedent's name only), and the notes, bonds, stocks, furniture and fixtures were held in joint tenancy by the decedent and his wife. [Tr. 32-33, 29, 99.] It was stipulated, in substance and effect, that said parcel of real property held in the decedent's name alone was either owned by decedent and his wife as joint tenants or by decedent only, at and immediately prior to the time of the execution of the agreement. [Tr. 32-33.] The Tax Court's "Findings of Fact" contained no specific finding upon the issue as to the ownership of said parcel at said time; but the Court held in its opinion that under the agreement decedent "received only a half interest by tenancy in common," and apparently recognized and found it to be a fact that the parcel of real property last-mentioned, like all of the other property affected by the agreement, was joint tenancy property at and immediately prior to the time the agreement was executed. [Tr. 91-101, 109.] The Court assumed in its findings of fact and in its opinion, but did not specifically find or hold, that the conversion of the joint tenancy properties into tenancy in common properties involved a transfer; and the Court

found as a fact that such transfer was made in contemplation of death and was not a bona fide sale for an adequate and full consideration in money or money's worth. [Tr. 91-101.] The Court did not determine or state in its findings of fact the amount, if any, by which the fair market value of the property, if any, transferred by decedent by or pursuant to the agreement, exceeded the value of the consideration received by decedent therefor, but the holding of the Court with reference to the properties involved, including the bank account and excluding the securities given to Floyd K. Sullivan appears to rest upon the premise that all or at least one-half of said properties was transferred by decedent to his wife and that he received nothing of value as consideration therefor. The Court made no determination in its "Findings of Fact" of the issue whether the property owned or held by decedent and his wife or either of them was or was not owned by them as tenants in common at the date of decedent's death; but as before stated, the Court in its opinion found as a fact and held that at the time of decedent's death his only interest in such property was that of a tenant in common. [Tr. 91-101, 109.] The Court held the entire value of the properties affected by the agreement of November 24, 1943, including, among other things, the United States Savings Bonds, together with the $2,400 withdrawn by decedent's wife from the bank account and deposited to her own credit during decedent's lifetime, includible in decedent's gross estate under Internal Revenue Code, Section 811(e)(1), which relates exclusively to joint tenancy property held by decedent and another person at the time of decedent's death and to property then held by spouses as tenants by the entirety. [Tr. 105-114.] The Court apparently reached this conclusion by recognizing local law making decedent and his wife

tenants in common, by then holding that a transfer is one made in contemplation of death solely because the effect thereof would be to minimize federal estate taxes [Tr. 109], by then giving to Internal Revenue Code, Section 811(c), relating to transfers in contemplation of death the effect *not of imposing a tax* but of *avoiding* a transaction sanctioned by local law, and by then invoking Section 811(e)(1) of the Code as authority for imposing the tax on the interests of both spouses as tenants in common despite the fact that at the time decedent's death he held no property as a joint tenant or as a tenant by the entirety. [Tr. 105-114.]

The Tax Court held petitioner had failed to establish error on the part of respondent in his determination of the asserted deficiency and in its decision then sustained such determination in its entirety. [Tr. 114, 115.]

Petitioner contends with reference to the transactions other than the gifts to Floyd K. Sullivan that: The findings of fact made by the Tax Court are contrary to the evidence as stated in paragraph (1) of the Specification of Errors contained herein and are deficient in the particulars stated in each of paragraphs (15) through (20), and (30) and (34) of said Specification of Errors; the conclusions and holdings of the Tax Court as set forth in its opinion were and are erroneous and deficient as stated in each of paragraphs (21) through (26), and (29) and (31) of said Specification of Errors; and the decision is not in accordance with and is contrary to law as stated in paragraphs (27), (28), (35) and (36) of said Specification of Errors. Petitioner's contentions in this connection are summarized in the statement of Questions Involved, hereinafter set forth, to each of which petitioner contends an affirmative answer should be given.

Questions Involved and Manner in Which Questions Raised.

The questions here involved arise upon a petition by the taxpayer to review a decision of the Tax Court of the United States.

The questions are as follows:

(1) Were the findings of fact to the effect that the transfers made by decedent and by his wife to their son were made in contemplation of decedents' death, unsupported by the evidence?

(2) Did the Tax Court err in failing to make findings of fact as follows: (a) a finding upon the issue whether the securities, aggregating $12,340.63 in value, standing in the name of decedent alone at and immediately prior to the time of the gifts to his son were then owned by him alone or by him and his wife as joint tenants; (b) a finding that such securities were then owned by decedent and his wife as joint tenants; (c) a finding that only an undivided one-half interest in the securities owned by the spouses as joint tenants and thereafter transferred to their son was transferred by decedent; (d) a finding that the value of the property interests transferred by decedent to his son did not exceed $16,763.27, or in any event did not exceed $22,933.59; (e) a finding that neither the whole nor any part of the property interests transferred by decedent to his son was transferred in contemplation of decedent's death; and (f) a finding that neither the whole nor any part of the property interests transferred by decedent's wife to her son was transferred in contemplation of decedent's death?

(3) Did the Tax Court err in the following holdings: (a) the holding that the entire value ($33,526.54) or any part thereof, of the securities given to the son of decedent, was includible in the value of decedent's gross estate by virtue of the provisions of Internal Revenue Code, Section 811(c) relating to transfers in contemplation of death; or under Internal Revenue Code, Section 811(e)(1), or otherwise; (b) the holding that the value, or any part thereof, of the interests transferred by decedent's wife to her son was includible in the value of decedent's gross estate under or by virtue of either of said sections, or otherwise; and (c) the holding that petitioner failed to establish error in respondent's action in treating said transfers as transfers made in contemplation of death?

(4) Is the decision in conflict with law as follows: (a) to the extent that the adjudicated deficiency was based upon the inclusion, in the value of decedent's gross estate, of the entire value ($33,526.54), or any part thereof, of the securities given to his son; and (b) to the extent that such deficiency was based upon the inclusion, in the value of decedent's gross estate, of the value of the interest of decedent's wife in the joint tenancy securities given to her son?

(5) Were the findings of fact to the effect that the "transfer" made on November 24, 1943, was made in contemplation of death and was not a bona fide sale for an adequate and full consideration in money or money's worth unsupported by the evidence?

(6) Did the Tax Court err in failing to make findings of fact as follows: (a) a specific finding upon the issue whether the parcel of real property of the value of $1,500 standing in decedent's name alone at and immediately prior to the time of the execution of the agreement of November 24, 1943, was then owned by decedent alone or by him and his wife as joint tenants; (c) a finding that no property or any interest therein affected by said agreement was transferred by decedent to his wife; (d) a finding as to the amount, if any, by which the fair market value of the property, if any, transferred by decedent to his wife exceeded the value of the consideration received by him therefor; (e) a finding that said last-mentioned amount did not exceed $750; and (f) a finding that at the date of decedent's death all of the property owned or held by him and his wife and each of them was owned by them as tenants in common in equal undivided shares and interests?

(7) Did the Tax Court err in the following holdings: (a) that the value ($25,013.80) of the interest of decedent's wife in the United States Savings Bonds, or any part of such value, was includible in the value of decedent's gross estate; (b) the holding that the value ($35,348.75) of the interest of decedent's wife in the remainder of the property affected by the agreement of November 24, 1943, exclusive of moneys withdrawn from the bank account, or any part of such value, was includible in the value of said estate; (c) the holding that the joint tenancy properties owned by decedent and his wife

and thereafter converted into tenancy in common properties, or any part of such properties, were transferred by decedent; (d) the holding that the transfers, if any, from decedent to his wife of an undivided one-half interest in said real property was a transfer in contemplation of decedent's death; and (e) the holding that petitioner failed to establish error in respondent's determination with respect to the transfers, if any, to decedent's wife?

(8) Was the holding that the value of the properties, exclusive of those given to decedent's son, was includible in the value of decedent's gross estate under Internal Revenue Code, Section 811(e)(1), unsupported by the findings of fact?

(9) Is the decision unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of his wife in the properties owned by her and decedent as tenants in common at the time of his death?

(10) Is the decision in conflict with law to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of decedent's wife in the properties owned by her and decedent as tenants in common at the time of his death?

(11) Did the Tax Court err in failing to give recognition to the laws of the State of California in determining

the effect of the agreement of November 24, 1943, and the acts of the spouses done pursuant thereto?

(12) Did the Tax Court err in holding that all or any part of the $2,400 withdrawn by decedent's wife from the bank account on December 20, 1943, was includible in the value of decedent's gross estate?

(13) Is the decision unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the moneys in excess of $1,200 withdrawn by decedent's wife from the bank account on December 20, 1943?

(14) Is the decision in conflict with law to the extent that the adjudicated deficiency is based upon the inclusion in the value of decedent's gross estate of the moneys withdrawn by decedent's wife from the bank account on December 20, 1943?

(15) Did the Tax Court err in failing to find as a fact and to hold that respondent was and is estopped and precluded by the provisions of and omissions from his notice of deficiency from assessing any deficiency based upon his inclusion in the value of decedent's gross estate under Internal Revenue Code Section 811(e) of the value of any properties involved exclusive of United States Savings Bonds?

(16) Did the Tax Court err in ordering and deciding in its decision that there is a deficiency of $18,963.17, or any other sum or amount, in estate tax?

SPECIFICATION OF ERRORS.

The petitioner assigns as error the following acts and omissions of the Tax Court:

(1) The following findings of fact and each and every part thereof are unsupported by and contrary to the evidence [Tr. 101]:

> "The transfers made on November 19, 1943, and November 24, 1943, were made in contemplation of death and the latter was not a bona fide sale for an adequate and full consideration in money or money's worth."

(2) The failure to make a finding of fact upon the issue concerning the ownership of the securities standing in the name of the decedent alone at and immediately prior to the time of the gifts to Floyd K. Sullivan.

(3) The failure to find as a fact that all of the securities, aggregating $12,340.63 in value, given to Floyd K. Sullivan, and standing in the name of decedent alone at and immediately prior to the time of the gifts, were then owned by decedent and his wife as joint tenants.

(4) The failure to find as a fact that only an undivided one-half interest in the securities owned and held by decedent and his wife as joint tenants and thereafter transferred to Floyd K. Sullivan was transferred by decedent.

(5) The failure to find as a fact that the value of the property interests transferred by decedent to Floyd K. Sullivan did not exceed $16,763.27.

(6) The failure to find as a fact that the value of the property interests transferred by decedent to Floyd K. Sullivan did not exceed $22,933.59.

(7) The failure to find as a fact that neither the whole nor any part of the property interests transferred to Floyd K. Sullivan by decedent was transferred in contemplation of decedent's death.

(8) The failure to find as a fact that neither the whole nor any part of the property interests transferred to Floyd K. Sullivan by the wife of decedent was transferred in contemplation of decedent's death.

(9) The holding that the value of the property interests transferred by decedent to Floyd K. Sullivan was $33,526.54 or any sum or amount in excess of $16,763.27.

(10) The holding that the entire value ($33,526.54), or any part of the value of the securities given to Floyd K. Sullivan, was includible in the value of the gross estate of decedent by virtue of the provisions of Internal Revenue Code Secton 811(c) relating to transfers in contemplation of death, or under Internal Revenue Code Section 811(e)(1), or otherwise.

(11) The holding that the value, or any part thereof, of the interests transferred by decedent's wife to Floyd K. Sullivan was includible in the value of decedent's gross estate by virtue of the provisions of Internal Revenue Code Section 811(c) relating to transfers in contemplation of death, or under Internal Revenue Code Section 811 (e)(1), or otherwise.

(12) The holding that petitioner failed to establish error in the action of respondent in treating the transfers to Floyd K. Sullivan as having been made in contemplation of death.

(13) The decision is not in accordance with and is in conflict with law to the extent that the adjudicated de-

ficiency was based upon the inclusion in the value of decedent's gross estate of the entire value ($33,526.54), or any part thereof, of the donated securities.

(14) The decision is not in accordance with and is in conflict with law to the extent that the adjudicated deficiency was based upon the inclusion, in the value of decedent's gross estate, of the value of the interest of decedent's wife in the joint tenancy securities given to her son.

(15) The failure to make a specific finding of fact upon the issue whether the parcel of real property (of the value of $1,500), standing in decedent's name alone at and immediately prior to the time of the execution of the agreement of November 24, 1943, was then owned by decedent alone or by decedent and his wife as joint tenants.

(16) The failure specifically to find as a fact that at and immediately prior to the time of the execution of the agreement dated November 24, 1943, the parcel of real property which was held in decedent's name alone was then owned by him and his wife as joint tenants.

(17) The failure to find as a fact that no property or any interest therein affected by the agreement of November 24, 1943, was transferred by decedent to his wife.

(18) The failure to make a finding of fact as to the amount, if any, by which the fair market value of the property, if any, transferred by decedent to his wife exceeded the value of the consideration received by decedent therefor.

(19) The failure to find as a fact that the amount by which the fair market value of the property, if any, transferred by decedent by or pursuant to the agreement

dated November 24, 1943, exceeded the value of the consideration therefor was not in excess of the sum of $750.

(20) The failure to find as a fact that at the date of decedent's death all of the property owned or held by him and his wife and each of them was owned by them as tenants in common in equal undivided shares and interests.

(21) The holding that the value, to-wit, $25,013.80, of the undivided one-half interest of decedent's wife in and to the United States Savings Bonds, owned by decedent and his wife as tenants in common at the time of his death, or any part of such value, was includible in the value of decedent's gross estate.

(22) The holding that the value, to-wit, $35,348.75, of the undivided one-half interest of decedent's wife in and to the property affected by the agreement of November 24, 1943, exclusive of the United States Savings Bonds, and of the moneys withdrawn from the bank account, owned by decedent and his wife as tenants in common at the time of decedent's death, or any part of such value, was includible in the value of decedent's gross estate.

(23) The holding that the joint tenancy properties owned by decedent and his wife and thereafter converted by them into tenancy in common properties, or any part of such properties, were transferred by decedent.

(24) The holding that the transfer, if any, from decedent to his wife of an undivided one-half interest in the parcel of real property standing in decedent's name alone at and immediately prior to the time of the execution of the agreement dated November 24, 1943, was a transfer in contemplation of decedent's death.

(25) The holding that petitioner failed to establish error in respondent's determination with respect to the transfers (if any) to decedent's wife.

(26) The holding that the value of the properties involved, exclusive of those given to Floyd K. Sullivan, was includible in the value of decedent's gross estate under Internal Revenue Code Section 811(e)(1) is unsupported by the findings of fact.

(27) The decision is unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of his wife in the properties owned by her and decedent as tenants in common at the time of his death.

(28) The decision is not in accordance with and is contrary to law to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the value of the interest of his wife in the properties owned by her and decedent as tenants in common at the time of his death.

(29) The failure to give recognition to the laws of the State of California in determining the effect of the transactions whereby the properties once owned and held by decedent and his wife and each of them were converted into tenancy in common properties and in determining the nature and extent of the property interests of decedent in said properties at the time of his death.

(30) The failure to make a finding of fact to the effect that at the time of his death decedent was not the owner of and had no interest as a joint tenant in any of the

moneys withdrawn from the bank account by his wife on December 20, 1943.

(31) The holding that the entire value ($2,400) or any part of the value of the moneys withdrawn by decedent's wife from the bank account on December 20, 1943, was includible in the value of decedent's gross estate.

(32) The decision is unsupported by the findings of fact to the extent that the adjudicated deficiency was based upon the inclusion in the value of decedent's gross estate of the amount of moneys in excess of $1,200 withdrawn by decedent's wife from the bank account on December 20, 1943.

(33) The decision is not in accordance with law to the extent that the adjudicated deficiency is based upon the inclusion in the value of decedent's gross estate of the amount of moneys withdrawn by decedent's wife from the bank account on December 20, 1943.

(34) The failure to find as a fact and to hold that respondent was and is estopped and precluded by the provisions of and omissions from his notice of deficiency from assessing any deficiency based upon his inclusion in the value of decedent's gross estate under Internal Revenue Code Section 811(e) of the value of any properties involved exclusive of United States Savings Bonds.

(35) The decision that there is a deficiency of $18,963.17 in estate tax.

(36) The decision that there is any deficiency in estate tax.

SUMMARY OF ARGUMENT.

The argument of petitioner is summarized as follows:

I. Rules of property established by California law and decisions of its courts are binding upon the federal courts and the Tax Court should have given recognition thereto in its determination.

II. The Tax Court erred in holding that the whole or any part of the value of the securities transferred by decedent and his wife to their son was includible in the value of decedent's gross estate.

A. All of the donated securities, aggregating $33,526.54 in value, were owned by the donors as joint tenants at the time of the gift; the interests of the spouses were equal; each spouse made a gift valued at $16,763.27 to their son; and neither spouse had any interest in the securities at the time of decedent's death.

B. The finding that the transfers to the son were in contemplation of death was unsupported by and contrary to the evidence.

1. A portion of the interests transferred was transferred by defedent's wife, not by decedent.

2. The requisite motive was lacking to constitute the transfer by decedent as one in contemplation of his death.

C. The findings of fact were deficient in that the Tax Court did not find on the material issue whether the securities aggregating $12,340.63 in value held in decedent's name alone were

owned by him only or by the spouses as joint tenants. If such a finding is included in the general finding that the transfers were in contemplation of decedent's death, it is contrary to the stipulation of facts and to the evidence. If the evidence warranted a finding that property of a value exceeding $16,763.27 was transferred by decedent, the value could not have exceeded $22,933.59, and the Court erred in not so finding. If by construction such a finding was made it does not support the conclusion of law that property of a value of $33,526.54 was transferred by decedent in contemplation of death.

D. It is implicit in the findings that neither of the donors held any interest in the donated securities at the time of decedent's death. The findings in this connection do not support the conclusion that any part of the value of the donated securities was includible in the gross estate as jointly held property under I.R.C. 811(e)(1).

E. The Tax Court erred in holding that petitioner failed to establish error in respondent's action relative to the gifts to the son.

1. The two-year presumption prescribed by I.R.C. Section 811(c) was inapplicable to the gift and transfer made by decedent's wife to her son, because the property did not belong to and was not transferred by decedent.

2. Such presumption was inapplicable to the gift and transfer by decedent to his son because it was not a transfer of a material part of decedent's property.

3. The two-year presumption, if any, was dispelled by the evidence.

4. Under the Tax Court's view the donated property was taxable under I.R.C. Section 811(e)(1) which prescribes no presumption.

5. The general burden of proof requirements were fully met by petitioner by substantial, unimpeached, uncontradicted evidence in which there was no conflict.

F. The decision is in conflict with law to the extent that the adjudicated deficiency was based upon the inclusion of any part of the value of the donated securities in decedent's gross estate.

III. The Tax Court erred in holding that any part of the value in excess of one-half thereof of the properties owned by decedent and his wife at the time of his death was includible in the value of decedent's gross estate.

A. By the agreement of November 24, 1943, all of the properties of decedent and his wife, whether jointly or severally owned, were converted into tenancy in common properties. Nothing in excess of one-half of the value thereof, constituting decedent's interest therein at the time of his death, was includible in his gross estate. Such interest was includible under I.R.C. Section 811(a) only.

B. By stipulation all of the properties affected by the agreement, valued at $123,125.10, except one parcel of land valued at $1,500, were owned by the spouses as joint tenants when the agreement was executed. By stipulation the $1,500 parcel was then jointly owned or was owned by decedent only.

C. The findings that the conversion of the joint tenancy properties into tenancy in common property was a transfer by decedent in contemplation of his death and was not a bona fide sale for an adequate and full consideration in money or money's worth were unsupported by and contrary to the evidence.

1. The effect of the agreement upon the joint tenancy properties was to extinguish the rights of survivorship, terminate the joint tenancies and convert the properties into tenancy in common properties by operation of law. No transfer by or to either spouse was involved in such conversion.

2. If any transfer by decedent was involved in such conversion, it was not a transfer in contemplation of death. The requisite motive was lacking. The mere fact the agreement resulted in a diminishment of estate tax liability was not sufficient evidence of such motive; and the agreement was executed solely by reason of suggestions made by the spouses' attorney. Furthermore, the transfer was made solely as a bona fide sale for an adequate and full consideration in money's worth.

D. The findings of fact were deficient in that the Tax Court did not find on the material issue whether the $1,500 parcel of land was owned by decedent only or by the spouses as joint tenants when the agreement was executed. The issue was material, for if all of the properties converted into tenancy in common properties were joint tenancy properties no transfer was made by decedent in contemplation of his death for the reasons above-stated; and if decedent alone owned the parcel at the time of the conversion, not more than one-half the value thereof ($750) could have been includible in decedent's gross estate as a transfer in contemplation of his death. The Tax Court also failed to find as a fact, in accordance with the evidence and the Court's own conclusion of law, that all of the property of the spouses was owned by them as tenants in common at the time of decedent's death.

E. Only one-half of the value of the United States Savings Bonds was includible in decedent's gross estate.

1. Said bonds, aggregating in value $50,027.60, were owned by the spouses as joint tenants when the agreement was executed. The interests of the spouses therein were converted into interests of tenants in common despite the fact there was no change in registration until after decedent's death. No interest in said bonds was transferred by decedent in contemplation of his death; if any transfer was made it was a bona file sale

for an adequate and full consideration in money's worth; and the spouses did not own any of said bonds as joint tenants at the time of his death. The contribution and other provisions of I.R.C. 811(e)(1) were inapplicable. They cannot be retroactively applied by treating I.R.C. Section 811(c) as avoiding rather than a taxing section. The undivided one-half interest of decedent's wife as a tenant in common therein was not includible in decedent's gross estate.

F. Only one-half of the value of the properties, exclusive of the United States Savings Bonds, was includible in decedent's gross estate.

1. The agreement of November 24, 1943, affected properties, exclusive of the U. S. Savings Bonds and the $2,400 joint bank account (closed and reopened in the name of decedent's wife only on December 20, 1943) of the value of $70,697.50, one-half of which ($35,348.75) the executor included in the gross estate. He included no part of the bank withdrawal in the gross estate. In his notice of deficiency respondent added to the gross estate all of the moneys withdrawn from the bank account ($2,400) and the remaining one-half value of the other properties ($35,348.75), as properties transferred by decedent in contemplation of his death under I.R.C. 811(c).

2. On the record the $2,400 bank withdrawal is to be treated like all of the other property affected by the agreement although only a nominal balance was in the account, which stood in the wife's name only, at the time of decedent's death.

3. What has been said with reference to the U. S. Savings Bonds applies to the other property, including the bank account, affected by the agreement, except that respondent did not even assert that the value of any of such property was includible in the gross estate under I.R.C. Section 811(e)(1).

G. The Tax Court erred in holding that petitioner failed to establish error in respondent's action in treating the "transfer" (if any) to decedent's wife as made in contemplation of death. The principles stated under II, E, *supra,* are applica- principles stated under II, E, supra, are applicable here.

IV. The Tax Court erred in failing to find and hold that respondent is estopped by his notice of deficiency from asserting a deficiency under the I.R.C. Section 811(e) with reference to any property involved except the U. S. Savings Bonds. With the exception mentioned, respondent relied solely on I.R.C. Section 811(c).

ARGUMENT.

I.

Rules of Property Established by Law and Decisions of California Courts Are Binding Upon the Federal Courts, and the Tax Court Should Have Applied Them.

Of extreme importance to a proper determination of this proceeding, and a fundamental principle applicable to the entire case, is the extent to which the laws of the State of California are to be applied in determining the nature of the respective interests of decedent and his wife in the properties involved here, as well as the status of those properties following the acts engaged in by decedent and his wife concerning them.

Among other things, petitioner contends the Tax Court was required to recognize the applicability of the laws of the State of California and the rules of property enunciated by its courts, and in failing to do so erred.

Prior to November 19, 1943, all of the properties involved in this proceeding, except those standing in decedent's name were owned and held in joint tenancy, and those standing in decedent's name alone, were either held in joint tenancy by decedent and his wife or were owned by decedent alone. [Tr. 32.] The joint holdings were true joint tenancies. (*Cf. Tomaier v. Tomaier* (1934), 23 Cal. 2d 754, 156 P. 2d 905.) Moreover the court found that prior to November 24, 1943, all of the property owned by the spouses and each of them, except one parcel of real estate (held in decedent's name), was held in joint tenancy by decedent and his wife. [Tr. 99.]

From the time of the decision of *Burgess v. Seligman* (1882), 107 U. S. 20, 2 Sup. Ct. 10, and the host of cases subsequently decided such as *Warburton v. White* (1900), 176 U. S. 484, 20 Sup. Ct. 404, it has been established that a rule of property fixed by decisions of a state court is binding on the Federal courts and such courts will adopt the local construction, whether those decisions are grounded on the statutes of the state or form a part of its unwritten law. (*Laugharn v. Bank of America N. T. & S. A.* (1937, C. C. A. 9), 88 F. 2d 551, cert. den. 301 U. S. 699, 57 Sup. Ct. 929, and *Edward Hines Yellow Pine, Trustees v. Martin* (1925), 268 U. S. 458, 45 Sup. Ct. 543; *Cf. Talcott v. U. S.* (1928, C. C. A. 9), 23 F. 2d 897, 899.)

In the field of federal taxation, the influence and applicability of local law has been met most frequently in matters of statutory interpretation. Congress by its enactments imposes a tax upon certain legal or property rights. If the Congressional legislation does not expressly define such legal or property rights, the court must look to local law for a definition of such interests. When such rights are so fixed, the taxability under federal mandate becomes established.

Congress has not seen fit to define any of the property interests concerned with here, and accordingly the local law must be looked to. Thus, before the taxable consequences of Congressional enactments may be decided upon on the facts here and the acts of decedent and his spouse, it is necessary to determine what interest decedent and his wife individually owned in the property subject to the asserted deficiency.

Thus, as said by Learned Hand, J., in *Johnston v. Helvering* (1944, C. C. A. 2), 144 F. 2d 208, cert. den. 323 U. S. 715, 65 Sup. Ct. 41:

> "* * * when Congress imposes taxes based upon the existence of legal rights or duties, it must be understood to refer to such rights and duties as the state law creates, since there are no others; nor could there be, unless Congress were to set up for its fiscal uses systems of municipal law parallel with those already existing in the states. * * *" (p. 210.)

The question has also been the subject of extended discussion by Paul in his work on estate and gift taxation. He says:

> "Local law always governs in the determination of property rights, and to that extent federal tax law always absorbs local law. Once these rights are ascertained the federal criteria of taxability prevail." (*Paul, Federal Estate and Gift Taxation,* 1946 Supp., p. 11.)

This proposition is also expressed in *Helvering v. Stuart* (1942), 317 U. S. 154, 63 Sup. Ct. 140, wherein there is distinguished a determination of "what interests or rights should be taxed" and a determination of "what interests or rights have been created." Federal law governs in the former case and local law in the latter. (*Cf. Paul, Federal Estate and Gift Taxation,* 1946 Supp., p. 11.)

These principles were confirmed in *Lang v. C. I. R.* (1938), 304 U. S. 264, 58 Sup. St. 880, affirming the decision of this court in 97 F. 2d 867. There it was held in applying the federal estate tax that incidents and inter-

ests under local property laws would govern to determine the nature of the estate taxed. See also: *Blair v. Com'r* (1936), 300 U. S. 5, 57 Sup. Ct. 330; *Frueler v. Helvering* (1933), 291 U. S. 35, 54 Sup. Ct. 308; and *C. I. R. v. Cadwallader* (1942, C. C. A. 9), 127 F. 2d 547, 548, all holding the application of federal tax statutes to be dependent upon local law.

In *Tooley v. Com'r* (1941, C. C. A. 9), 121 F. 2d 350, this court held that the federal Court, in determining whether a surviving joint tenant holds the deceased tenant's share in property under the original grant or as transferee of the deceased tenant, must apply and be governed by the state law. In *U. S. v. Pierotti* (1946, C. C. A. 9), 154 F. 2d 758, this court said:

> "It is conceded that state law governs in determining the gross estate of a decedent for Federal Estate Tax purposes, and in determining *the nature of the tenancy* by which property is held by married persons in California." (p. 762.) (Our emphasis.)

Pertinent too is *Fox v. Rosthensies* (1940, C. C. A. 3), 115 F. 2d 42, where the court held it was bound by local rules of property and decisions of the state's Supreme Court regarding tenancy by the entirety in applying the federal estate tax.

The precise question is whether the Tax Court was bound to determine the nature, interests and rights of decedent and his wife in their joint tenancy properties according to local law. In this respect, a number of decisions under federal tax laws have applied local law and rules concerning joint tenancies. In *Edmonds v. Com'r* (1937, C. C. A. 9), 90 F. 2d 14, the Court deciding

certain income tax questions discussed the incidents of joint tenancy enunciated by California statutes and case law and applied that law. See particularly concurring opinion of Wilbur, J. on page 18.

In *Greenwood v. Com'r* (1943, C. C. A. 9), 134 F. 2d 915, it was said:

> "In determining the gross estate of a decedent for the purpose of computing the Federal Estate Tax we must look to state law" (p. 918).
>
> (Citing *Lang v. Com'r, supra.*)

In *Gwinn v. Com'r* (1932, C. C. A. 9), 54 F. 2d 728, affirmed in 287 U. S. 224, 53 Sup. Ct. 157, the court held the "transfer" (in a tax sense) of a deceased joint tenant's estate upon his death was taxable. Both the Court of Appeals and the Supreme Court recognized the incidents of joint tenancy established by state law. The Court said:

> "Section 683, Civil Code of California, in defining joint tenancy, makes no change in the character, attributes, or incidents which the common law assigned that species of property holding. The unities of title, interest, and possession remain affixed. Under the common law, one of such tenants had not the right to the exclusive possession of the property, and that right accrued to him only upon the death of his cotenant; *and his cotenant might destroy the joint tenancy during his lifetime by transfer of his interest; he could also cause partition of the property to be decreed in proportion to interests.* Mr. Kent, in his Commentaries (volume 4, p. 360, 4th Ed.), treating

> of the subject of joint tenancy, says: 'A joint tenant in respect to his companion is seized of the whole; but for the purposes of alienation * * * he is seized only of his individual part or proportion." (P. 729.) (Our emphasis.)

The Supreme Court in its affirming decision, at page 228 of 287 U. S., says:

> "Although the property here involved was held under a joint tenancy with the right of survivorship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed *since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution.* Cal. Code Civ. Proc. §752; *Green v. Skinner,* 185 Cal. 435, 197 Pac. 60; *Hilborn v. Soale,* 44 Cal. App. 115, 185 Pac. 982. The right to effect these changes in the estate was not terminated until the co-tenant's death." (Our emphasis.)

See also to the same effect as the above authorities:

> *Talcott v. U. S.* (C. C. A. 9, 1928), 23 F. 2d 897;
>
> *Gillis v. Welch* (C. C. A. 9, 1935), 80 F. 2d 165.

From the foregoing discussion it is clear that the Tax Court should have applied the local law consistently in determining property rights and interests of the spouses in this case.

II.

The Tax Court Erred in Holding That the Whole or Any Part of the Value of the Securities Transferred by Decedent and His Wife to Their Son Was Includible in the Value of Decedent's Gross Estate.

A. The Nature of the Respective Interests of the Donors.

As pointed out in our statement of the case, it was stipulated, in substance, that all of the properties given to Floyd K. Sullivan, except those standing in decedent's name alone at and prior to the time of the gifts (November 19, 1943), were then owned by the spouses as joint tenants. It was also pointed out that the aggregate value of the securities then standing in decedent's name alone was $12,340.63. It was therefore conceded and in effect stipulated by the litigants, and must be taken to be a fact in the case, that donated securities of a minimum value of $21,185.91 were owned by the donors as joint tenants at the time of the gifts. Petitioner contends that *all* of the donated securities, aggregating $33,526.54, were so owned by the donors at the time of the gifts, and that the Tax Court should have so found.

At this point it is desirable to consider the nature and incidents of the joint tenancy holdings which, as before indicated, are governed by California law.

At the outset it should be noted that respondent has not taken the position that the value of any part of the securities transferred to the son of decedent and his wife was includible in decedent's gross estate under or by virtue of Section 811(e)(1) of the Internal Revenue Code, which, subject to specified exceptions, imposes an

estate tax upon the value of properties held by the decedent and another person as joint tenants (at the time of decedent's death), or held by decedent and his or her spouse as tenants by the entirety at said time. Respondent seeks to impose the tax under the provisions of Internal Revenue Code Section 811(c) relating to gifts in contemplation of death. The Tax Court sustained his determination of the deficiency but held that the value of the donated securities was includible in decedent's gross estate under Internal Revenue Code Section 811(e)(1).

The importance of reviewing the joint tenancy rules and concepts at this point results from the necessity of determining what was or could have been taxed under Section 811(c) or Section 811(e)(1). The answer to this inquiry depends, not only upon what motivated the transfer or transfers, but also upon what property was transferred, by whom, the values of the transferred interests, and the nature of the interests of the spouses in the properties.

Section 683 of the California Civil Code provides:

> "§683. (*Joint tenancy defined, and how created.*) A joint interest is one owned by two or more persons in *equal shares,* by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself and others, or from tenants in common to themselves, or to themselves and others, or from a husband and wife when holding title as community property or otherwise to themselves or to themselves and others when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created

by a written transfer, instrument or agreement. Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act." (Our emphasis.)

Under Civil Code Section 683 and the decisions of California courts, the interest of a joint tenant is his separate property. This is a rule of property of the State of California. *Delanoy v. Delanoy* (1932), 216 Cal. 23, 13 P. 2d 513; *In re Sterling* (1937), 20 Fed. Supp. 924 (Cal.); *Estate of Harris* (1937), 9 Cal. 2d 649, 72 P. 2d 873. As before shown herein, the rule is binding upon the federal tribunals.

The basic characteristics of a joint tenancy estate are the four unities of interest, title, time and possession. The attributes of such a tenancy in California are the same as those assigned by the common law to that method of holding property.

Gwinn v. Com'r. (C. C. A. 9), *supra.*

Joint tenants hold their respective interests by the moiety and by the whole. This means that such tenants are seized of the entire estate for the purposes of tenure and survivorship, but of a particular part, interest or undivided share for the purpose of alienation, partition or forfeiture. Because of the requirement of unity of interest, the shares of joint tenants must be equal.

Northrup, Law of Real Property, pp. 102-103;

Tiffany, The Law of Real Property (3rd Ed.), Sec. 418, pp. 196 and 198;

14 *Am. Jur.* 81 and

Cal. Civ. Code, Sec. 683.

The unities of title and time in a joint tenancy will be destroyed if the tenancy is terminated or severed. If any of the unities, except that of possession, is destroyed, the joint tenancy ceases to exist, and a tenancy in common is created by operation of law where the property is vested in two or more persons after the joint tenancy has been terminated.

Northrup, Law of Real Property, p. 109;

Tiffany, The Law of Real Property (3rd Ed.), Sec. 425, pp. 208-209.

An important incident of a joint tenancy estate is the right of either tenant to alienate his interest in the property without the consent of the other and thereby effect a severance or a termination of the tenancy. Such a termination or severance may be effected by a release by one joint tenant in favor of his cotenant. *Swartzbaugh v. Sampson* (1936), 11 Cal. App. 2d 451, 54 P. 2d 73; *Estate of Harris, supra.* But no joint tenant has the right or power to transfer any part of the interest of another joint tenant.

A joint tenancy may be terminated by mutual agreement or by conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them as tenants in common.

Tiffany, The Law of Real Property (3rd Ed.), 1947 Cum. Supp. Sec. 425, p. 42;

McDonald v. Morley (1940), 15 Cal. 2d 409, 101 P. 2d 690.

The foregoing is particularly applicable to the agreements and acts of decedent and his wife under provisions of California Civil Code Sections 161, 158 and 159, which permit husbands and wives to hold property as joint tenants and to contract with each other respecting their property, pertinent provisions of which are as follows:

> "§161. (*May be joint tenants, etc.*) A husband and wife may hold property as joint tenants, tenants in common, or as community property.
>
> "§158. (*Husband and wife may make contracts.*) Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.
>
> "§159. (*Contract altering legal relations: Separation agreement.*) A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, * * *."

From the foregoing authorities it is clear the interests of decedent and his wife in the securities held in joint tenancy and given to their son were equal, undivided interests, the respective interests of the spouses being his or her separate property. Since decedent and his surviving spouse jointly gave the mentioned securities to their son, it follows that one-half of the total interest in the joint tenancy securities acquired by the son was a gift from his father, and the remaining one-half interest in such securities was acquired by him as a gift from his mother. This proposition applies to all of the donated joint tenancy securities, including those the record title to which stood in the name of the decedent alone.

Under the law of California, all property acquired as a result of investment or reinvestment of joint tenancy property, regardless of legal or record title, and in the absence of fraud, is joint tenancy property unless the tenants' intention is shown to be otherwise. Where legal title to property acquired with the proceeds of joint tenancy property is taken in the name of one of the tenants alone, it will be impressed with the character of its source and the holder deemed a trustee for the joint tenancy.

Estate of Harris (1915), 169 Cal. 725, 147 Pac. 967;

Fish v. Sec.-First National Bank (1948), 31 Adv. Cal. 388, 189 P. 2d 10.

The evidence before the Tax Court was uncontradicted that all of the proceeds of the property owned or held by decedent and his wife as joint tenants were reinvested in other properties without any intention on the part of either spouse to alter the joint tenancy character of their holdings, and that the spouses intended, believed and thought they owned and held all of their property in joint tenancy from the time they made California their home until the agreement of November 24, 1943, was executed. [Tr. 125-126.] Their intention is to be given effect until the opposite be shown, however the legal or record title may be held. Thus, all property involved in this proceeding at and immediately prior to the time the gifts to the son were made (November 19, 1943), even though it stood in the name of decedent alone, must be deemed to have been joint tenancy property and impressed with its characteristics. The gifts to the son therefore consisted of a gift

of an undivided one-half interest valued at $16,763.27 from decedent, and a gift of an undivided one-half interest valued at $16,763.27 from decedent's wife. By these gifts decedent and his wife completely divested themselves of all interest in the donated securities and such securities were not, therefore, held by the spouses as joint tenants or otherwise at the time of decedent's death.

B. Analysis of Findings of Fact and Conclusions of Law.

As was pointed out in our statement of the case, it was settled by stipulation that the aggregate value of the securities transferred to Floyd K. Sullivan was $33,526.54, and that all of the securities except those of an aggregate value of $12,340.63 (which were held in the name of decedent alone at and prior to the time of the gifts) were owned by him and his wife as joint tenants. It was thus conceded by the parties that donated securities of at least $21,185.91 were owned by the spouses as joint tenants when the gifts were made.

An issue was raised by the pleadings as to whether the securities held in decedent's name alone were owned by him only or by the spouses as joint tenants. This was a material issue upon which the Tax Court made no finding of fact, unless the finding of fact to the effect that the transfer of November 19, 1943, was in contemplation of death amounts to a finding upon such issue. Construed as such a finding, the finding is clearly contrary to the stipulation of facts (and to the evidence) if it means that the decedent was the sole owner of all of the transferred securities; and the finding is clearly unsupported by and contrary to the evidence to the extent that it determines that the securities standing in decedent's name only, were

owned by him alone and not by the spouses as joint tenants. The Tax Court therefore erred in failing to make a finding of fact on that material issue, or its findings were unsupported by and contrary to the evidence in the particulars just discussed.

The Court should have found as a fact that all of the donated securities, having an aggregate value of $33,526.54, were owned by the spouses as joint tenants when the gifts were made; and that the gifts consisted of an undivided one-half interest of the value of $16,763.27 transferred by decedent, and an undivided one-half interest of the value of $16,763.27 transferred by the wife. Even if the evidence had warranted a finding that the donated securities standing in decedent's name alone were owned by him only at the time of the gifts, the maximum value of the interest transferred by him to his son was $22,933.59, and the minimum value of the interest transferred by his wife to the son was $10,592.95, and it was error for the Tax Court to fail to make such a finding. If by any strained construction such a finding can be found in the record, then it clearly does not support the conclusion of law and holding that the entire value of the donated securities ($33,526.54) is includible in decedent's gross estate as a transfer made by him in contemplation of his death, and the decision is erroneous to the extent it rests upon such erroneous conclusion of law and holding.

It was implicit in the findings of fact that by making the gifts to their son the spouses parted with all interest in the donated securities. The conclusion of the Tax Court that such securities were includible in decedent's gross estate as jointly held property under I. R. C., Section 811(e)(1), was therefore not supported by the findings.

C. The Gift From Decedent's Wife to Her Son.

By including in decedent's gross estate the value of the interest owned by decedent's wife in the donated securities, respondent in effect subjected to tax her interest as a transfer by decedent in contemplation of his own death under Section 811(c), I. R. C., and the Tax Court's decision confirms the determination of respondent in this connection but imposes the tax, not under I. R. C., Section 811(c), but under I. R. C., Section 811(e)(1). The value of the wife's interest so included was, petitioner contends, $16,763.27, but on no construction of the findings of fact, in view of the stipulated facts and the evidence, could it have been less than $10,592.95, as before pointed out herein. The Tax Court's action in this connection is, we believe, without precedent. Our research reveals no similar holding or decision.

As previously indicated herein, the law is settled that decedent's spouse could have alienated her one-half interest to her son, or another person, without the necessity of decedent's joining with her or consenting to such transfer (*Estate of Harris,* 9 Cal. 2d 649, *supra*), and the property was owned by her as her separate interest and not by decedent. And the law is also settled that decedent, as one of two joint tenants, did not have the legal *power* to transfer the whole or any part of the interest of his co-tenant; where there are two joint tenants one of them can transfer no more than an undivided one-half interest in the properties.

The language of Section 811(c) is plain and is applicable only to "the extent of any interest * * * of which * * * *decedent has* * * * *made a transfer.* * * *" (Our emphasis.) It is clear from the section that the only transfers affected by it are transfers made

by *decedent.* (*Brown v. Routzahn* (C. C. A. 6, 1933), 63 F. 2d 914, cert. den. 290 U. S. 641, 54 S. Ct. 60, reh. D. C. Ohio, aff'd (C. C. A. 6, 1938) 95 F. 2d 766; *Williams v. United States* (1930), 41 F. 2d 895, 70 Ct. Cl. 267.) It is also implicit in the section that a *transfer,* within the meaning of I. R. C., Section 811(c), must be a transfer of property owned by the decedent.

Amelia Solomon (1941), 43 B. T. A. 234;

Comm'l Nat. Bank (1937), 36 B. T. A. 239.

Unless the Tax Court's findings of fact are construed as determining that the decedent alone owned and transferred all of the securities (an erroneous finding as before shown), the effect of the holding and decision, insofar as it supports respondent's action, is to include, as a transfer in contemplation of death under I. R. C., Section 811(c), a property interest (his wife's) which the decedent did not own, had no power to transfer and did not transfer. This action of the Tax Court was in conflict with the plain language of the statute and was contrary to authority. It was palpably erroneous and should not be permitted to stand.

What we have said disposes of the proposition that respondent may include the property of the decedent's *spouse,* transferred by her to her son, in his estate as a transfer taxable under I. R. C., Sections 811(c) or 811(e)(1), and leaves for disposition the question whether the one-half interest transferred by decedent is includible in his gross estate under either of said sections.

D. The Gift From Decedent to His Son.

The presumption that the transfer is in contemplation of death when made within the statutory period prescribed by Section 811(c), I. R. C., is not evidence and is dispelled when any evidence to rebut the same is presented.

> *Blakeslee v. Smith* (D. C. Conn., 1939), 26 Fed. Supp. 28, affirmed (C. C. A. 2, 1940) 110 F. 2d 364.

It is fundamental that the prime element in determining whether decedent's gift to his son was in contemplation of death was the motive actuating it. The incontrovertible evidence discloses that decedent's sole motive was to augment the property of his son and provide him with needed income. Strongly corroborative is evidence showing decedent had previously come to the son's financial rescue, provided him with working capital in an investment business, had given him a home, and accepted less than full payment in complete satisfaction of an indebtedness owing to decedent from his son. [Tr. 126, 162-163, 165-166.]

Other evidence negatives the gift as one in contemplation of death. The value of the interest donated by decedent was only a small portion of his wealth. When the gift was made, decedent, a "very rugged and active" man, was in good health, unaware of any physical ailment or infirmity, if it existed, was physically active, caring for his own business affairs, enjoying the diversion of golf, smoking many cigars daily and generally leading a healthy, energetic life. [Tr. 162, 96.]

As the evidence shows, the actual cause of death was surgery, and though there appears reference in the pre-

operative diagnosis to cancer of the pancreas, there is no evidence that decedent was aware he was so afflicted, the only evidence pertinent to knowledge of his physical condition being that he understood he had some gallbladder complication. Following two surgical procedures between December 20, 1943, and January 3, 1944, decedent died. It appears quite clear that his death was the result of surgery for cancer. [Tr. 134-135.] Under these facts, *Levi, Executor, v. U. S.* (Ct. Cl., 1946), 14 Fed. Supp. 513, is especially significant.

When decedent's intention to make the gift was formed, he was not even contemplating estate or inheritance tax savings. [Tr. 194-195.] There is nothing in the record to show he ever entertained tax-saving notions or that he ever considered the possibility of saving taxes. It is true that Mr. Triplett, a tax attorney, suggested that some advantages might be effected by terminating the joint tenancies of the *remaining* properties, without, however, making "much difference in tax consequences." [Tr. 99, 180-181, 195.] Even construed as tax-saving advice, transfers made as a result of the suggestions of an attorney are not includible under I. R. C., Section 811(c), because the requisite motive is not existent.

Estate of Stinchfield (1945), T. C. M. C. C. H. 14558M, reversed on other grounds in

Com'r v. Stinchfield's Estate (C. C. A. 9, 1947), 161 F. 2d 555.

The evidence conclusively shows decedent and his wife had decided to make the son's gift before they consulted

Mr. Triplett and the object of their first visit to him was to ascertain the amount of gift tax imposed on the *inter vivos* transfer to the son. [Tr. 174.]

Finally, the gift was not a substitute for a testamentary disposition or even for intestate succession. At the time the gift was made the decedent had no testamentary powers over the securities given to the son (since held in joint tenancy) although he had a will in effect. Even if he had left no will and died intestate, the son would have taken none of the securities upon decedent's death. The only way the son could benefit from the securities was to receive them by *inter vivos* gift. The only conclusion reasonably to be drawn from the evidence on this point—and there is none to the contrary—is that a living motive was the dominate, controlling and impelling cause of the gift. See *Allen v. Trust Company of Georgia* (1946), 326 U. S. 630, 66 Sup. Ct. 389, which repudiates the test that a "motive" associated with death, for example, avoidance of estate taxes, need only be "substantial" to make a transfer or release "in contemplation of death" and reaffirms the original rule that the thought of death must be "the impelling cause" of the transfer.

The transfer by decedent was not, therefore, within I. R. C., Section 811(c). And obviously no part of the value of the interest transferred by decedent to his son was includible in the gross estate as jointly held property under I. R. C., Section 811(e)(1), because decedent parted with his interest before he died and it was not vested in him at the time of his death.

E. Burden of Proof.

The two-year presumption established by I. R. C., Section 811(c), applies only to transfers made by *decedent* of a *material part* of *his* property. In this case the evidence shows that only an undivided one-half interest in the donated securities was transferred by decedent and that the value of such interest was not a material part of decedent's property. [Tr. 162.] The remaining undivided one-half interest was transferred not by decedent but by his wife. Accordingly, the presumption created by Section 811(c) was not applicable. Furthermore, if such presumption was applicable, it was dispelled by the evidence which established conclusively that decedent transferred nothing to his son in contemplation of decedent's death.

Also, the Tax Court upheld the imposition of the tax upon the value of the donated securities under I. R. C., Section 811(e)(1), which contains no provision relative to presumptions.

Finally, petitioner clearly satisfied the general burden of proof requirements. He introduced substantial evidence which was not impeached or controverted. Respondent called no witness and introduced no evidence, and the evidence was not in conflict.

The Tax Court plainly erred in holding that petitioner failed to establish error in respondent's action in treating the transfers to Floyd K. Sullivan as transfers made in contemplation of death.

III.

The Tax Court Erred in Holding That Any Part of the Value in Excess of One-half Thereof of the Properties Owned by Decedent and His Wife at the Time of His Death Was Includible in the Value of Decedent's Gross Estate.

A. The Nature of the Property Interests of Decedent and His Wife at the Time of His Death.

By the agreement dated November 24, 1943, decedent and his wife, acting solely upon suggestions of their attorney, converted all of the properties then owned by them and each of them into tenancy in common properties. [Tr. 19, 99.] The spouses thereafter owned as tenants in common equal undivided shares and interests in such properties. These facts were, in substance, recognized by the Tax Court in its findings of fact and opinion. [Tr. 99, 109.] The formal transfers by deed and assignment made on November 24, 1943, added nothing to the legal effect of the agreement creating the tenancies in common. The tenancies in common existed at the time of decedent's death and petitioner contends that nothing in excess of the value of decedent's undivided one-half interest in the properties was includible in his gross estate, and that the only applicable taxing law was I. R. C., Section 811(a), which requires the inclusion in decedent's gross estate of all property to the extent of the interest therein of the decedent at the time of his death.

The necessity of considering the nature and extent of the interests of the spouses in the properties at and immediately prior to the time of the execution of the agreement arises solely from the contentions of the respondent as set

forth in his notice of deficiency and the theories of the Tax Court as expounded in its opinion.

Neither respondent nor the Tax Court has asserted that there is a deficiency in estate tax by reason of the failure of the executor to include in his estate tax return, as a part of decedent's gross estate, any part of the value of decedent's interest as a tenant in common, except perhaps one-half of the $2,400 withdrawn by decedent's wife from the bank account. Respondent asserts that the creation of the tenancies in common involved a transfer by decedent in contemplation of his death and without an adequate and full consideration, thus subjecting the value of the interest of decedent's wife in the properties to estate tax in her husband's estate. Respondent further asserts that the entire value of the United States Savings Bonds is also includible in the gross estate as jointly held property under I. R. C., Section 811(e)(1). The Tax Court agreed with respondent's contemplation of death theory but curiously invoked Section 811(e)(1) and not Section 811(c) of the Internal Revenue Code as specifically authorizing the imposition of the tax.

It was stipulated, and the Tax Court found, that all of the properties affected by the agreement were owned by the spouses and each of them at and immediately prior to the time of the execution of the agreement, as joint tenants, except one parcel of real property (of the value of $1,500) standing in decedent's name alone. [Tr. 99.]

The total value of the properties affected by the agreement was $123,125.10 including the moneys ($2,400) withdrawn by decedent's wife from the bank account on December 20, 1943. It was conceded and stipulated by the parties and found by the Tax Court in substance that properties of an aggregate value of $121,625.10 (the total

value of $123,125.10 less $1,500, the value of the parcel of real property standing in decedent's name alone) were owned by the spouses as joint tenants at and immediately prior to the execution of the agreement. Petitioner contends that all of the properties affected by the agreement, aggregating $123,125.10 in value, were owned by the spouses as joint tenants at and immediately prior to the execution of the agreement and that the Tax Court should have so found.

Sufficient has already been said in this brief about the general nature and incidents of joint tenancies under the laws of California. The more important of these incidents, in their relation to the subject of the creation of tenancies in common, are these: (a) The interests of joint tenants are equal; (b) one of the essential incidents of a joint tenancy is the right of survivorship vested in each tenant; (c) the tenants may, by agreement or transfer, extinguish the right of survivorship; (d) extinguishment of the right of survivorship will terminate the joint tenancy; and (e) the persons, if more than one, in whom the property remains or is vested upon and after the termination of the joint tenancy become tenants in common by operation of law. It should also be borne in mind that all property acquired with the proceeds of or in exchange for joint tenancy property becomes joint tenancy property in the absence of a contrary intention on the part of the owners of the original properties, and that property may be joint tenancy property although the legal title thereto is vested in or held by one only of the joint tenants.

In this case the spouses did, by agreement of November 24, 1943, abrogate and extinguish their respective rights of survivorship, the joint tenancies were thereby terminated and the spouses thereupon became and thereafter

remained tenants in common. Petitioner contends that the tenancies in common were created by operation of law and not by virtue of any transfer by or to decedent; and that if any transfer was made by decedent in the conversion of the joint tenancy properties, it was made in consideration of another transfer of property of equal (or even greater) value to decedent from his wife, and that the transaction was in substance and effect a sale for an adequate and full consideration in money's worth. Under the view held by petitioner, nothing which was done by decedent or his wife was affected by the provisions of I. R. C., Section 811(c), concerning transfers in contemplation of death, and Section 811(e)(1) of the Code was entirely inapplicable because the spouses did not, at the time of decedent's death, own or hold any property as joint tenants or as tenants by the entirety.

B. Analysis of Findings of Fact and Conclusions of Law.

As has already been pointed out, it is an established fact in the case that all of the properties affected by the agreement of November 24, 1943, and converted into tenancies in common thereby, except the parcel of land of the value of $1,500 standing in decedent's name alone, were joint tenancy properties. An issue was raised by the pleadings as to whether the $1,500 parcel was owned by decedent alone or by the spouses as joint tenants when the agreement was executed. The issue was material, for if all of the properties converted into tenancy in common properties were joint tenancy properties, then the conversion either involved no transfer or, if there was a transfer from decedent to his wife, it was made for an adequate and full consideration in money's worth, and I. R. C., Section 811(c), was inapplicable. Furthermore, if dece-

dent alone owned the parcel at the time of the conversion, he transferred only an undivided one-half interest in it to his wife—an interest valued at $750—and the value of the properties transferred by decedent to his wife could not have exceeded the value of the consideration received by him therefor by more than $750, and not more than $750 in value could have been includible in his gross estate under I. R. C., Section 811(c). (Reg. 105, Sec. 81.15.) The Tax Court erred in not making a finding of fact on this material issue and in not finding the amount, if any, by which the value of the property transferred by decedent to his wife exceeded the value of the consideration received by him for it.

The finding to the effect that the transfer made on November 24, 1943, was in contemplation of death and was not a bona fide sale for an adequate and full consideration in money's worth does not dispose of the issue and is in itself unsupported by and contrary to the evidence. It was implicit in the Tax Court's findings in this connection that the mere fact that the decedent entered into an agreement which resulted in a diminishment of his estate for tax purposes [Tr. 109] rendered his "transfer" to his wife a transfer in contemplation of death. There was no other evidence of a contemplation of death motive, and the two-year presumption was dispelled by the evidence which was introduced. The Supreme Court of the United States has decided that the fact that a transfer is made by the decedent for the purpose of minimizing or avoiding estate taxes is not in itself sufficient to make the transfer one in contemplation of death. *Allen v. Trust Company of Georgia, supra,* and in the case now on review the evidence failed to show even the existence of such a purpose. [Tr. 180-181, 195.] Also, as will hereinafter be shown,

it was established by the evidence that the transfer, if any, made by decedent, was made as a part of a bona fide sale for an adequate and full consideration in money's worth.

The Tax Court also erred in failing to find as a fact that, at the date of decedent's death, all of the property of the spouses was owned by them as tenants in common. The evidence conclusively established that such was the fact, and the Tax Court at least partially recognized this in its opinion by holding that decedent became a tenant in common by virtue of the agreement. [Tr. 109.]

The Court should have found as a fact that all of the properties affected by the agreement were owned by the spouses as joint tenants at the time the agreement was executed; that decedent transferred nothing to his wife in contemplation of his death or otherwise; that if decedent made any transfer to his wife it was made solely as a part of and in consummation of a bona fide sale for an adequate and full consideration in money's worth; that the only properties in which decedent had an interest at the time of his death were those then owned by him and his wife as tenants in common; and that only the value of his undivided one-half interest in the properties as a tenant in common was includible in his gross estate.

C. Only One-Half of the Value of the United States Savings Bonds Was Includible in Decedent's Gross Estate.

The U. S. Series G Bonds issued in the joint names of "Frank K. Sullivan or Hattie B. Sullivan" remained in such form until subsequent to decedent's death, when, for the first time the bonds could be redeemed, and formal transfers were then effected. [Tr. 99.]

Section 704 of the California Civil Code, effective February 10, 1943, provides in part as follows:

> "§704. (Bonds or obligations of the United States.)
>
> "*(Registration in two names as co-owners in alternative.)* All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the names of two persons as co-owners in the alternative, shall, upon the death of either of the registered co-owners, become the sole and absolute property of the surviving co-owner, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws. provide otherwise.
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> * * * * * * * *
>
> "*(Construction of section.)* This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided."

Since tenancies by the entireties are not recognized in California, it must follow under the stipulation, the quoted statute and the findings of the Tax Court [Tr. 32, 99], that said bonds were held in joint tenancy.

As previously stated herein, the mutual agreement of joint tenants is effective to sever a joint tenancy and one tenant can sever such an estate without the consent of his co-tenant by virtue of the right of alienation incident to it. These principles are particularly applicable to husbands and wives who so hold property, under their contract rights. (Cal. Civ. Code, Sec. 158.)

In consequence, the agreement of November 24, 1943, operated *co instanti* to sever the joint tenancy ownership of said bonds and effected by operation of law a commutation of the interests of decedent and his wife to those of tenants in common.

Tiffany, The Law of Real Property (3rd Ed.) Sec. 425, p. 211;

Estate of Lester L. Fletcher (1941), 44 B. T. A. 429.

The agreement severing the joint tenancies was effective upon its execution, notwithstanding formal transfers were not accomplished until after decedent's death. Even an oral agreement would have sufficed to accomplish the purpose. *Estate of Lester L. Fletcher, supra.* In any event it was impossible to procure formal transfer of the bonds and to divide them equally until after decedent's death [Tr. 22, 160-161], and the Tax Court so found. [Tr. 99.]

The action of respondent served to include the total value of the United States Savings Bonds in decedent's gross estate under I. R. C., Section 811(c) as well as I. R. C., Section 811(e). One-half of the total value was included in decedent's estate tax return. The initial question then is, does Section 811(c) apply to the commutation by operation of law of decedent's and his wife's interests as joint tenants into undivided interests as tenants in common?

As indicated above, under California law each joint tenant's interest is his separate estate. Consequently prior to the execution of the agreement of November 24, 1943, decedent and his wife separately enjoyed equal undivided interests in the whole of the bonds. By virtue of the four

unities, they each likewise had actual present possession, management and control. Pursuant to the doctrine of survivorship, either would become the owner of the whole if he or she outlived the other. After the agreement was executed, decedent and his wife each separately owned an undivided one-half interest in the whole and each had a statutory right to dispose of his or her share by will, a right neither enjoyed as a joint tenant, but each had relinquished the possibility of becoming complete owner of the whole by virtue of survival.

Mrs. Sullivan's expectancy was greater than decedent's (she survived decedent, as the Tax Court found [Tr. 101]) and thus if any transfer occurred, the real effect of the agreement was that she relinquished more than decedent did. *Sampson v. Welch* (D. C. Cal. 1938), 23 Fed. Supp. 271, 287. The right of survivorship was a property right of substantial monetary value. Had the wife possessed it at the time of decedent's death, it would have been worth to her in excess of $25,000, viz., the value of decedent's one-half interest. If the agreement operated to effect a change of property interests by transfers, including the rights of survivorship, from one spouse to the other, one of its results was the surrender of decedent's survivorship right to his wife and the surrender of her more valuable survivorship right to decedent, and the value of the remaining interests retained by or vesting in each spouse was exactly equal to the value of the interest he or she therefore had, exclusive of his or her surrendered survivorship right. Therefore, decedent's wife actually parted with more than she received from decedent, if the rights of survivorship are taken into account. Actually, of course, neither right of survivorship was transferred, and if the residual interests were transferred, they

were of equal value. As we view the transaction, no transfer by either spouse occurred at or after the time the agreement was executed except formal transfers made for record title purposes only, which added nothing to the effect of the agreement.

Whether the wife did or did not contribute property or services to the acquisition of the joint tenancy properties is immaterial. There was no joint tenancy property in existence at the time of decedent's death and I. R. C., Section 811(e)(1), which makes the survivor's contribution material, was inapplicable. However, the record shows that in 1922, following decedent's retirement, he and his wife moved to California and all property accumulated by him in Minnesota was invested in joint tenancy properties and all proceeds of the sale thereof were reinvested in properties of like character. If any transfer (as that word is used in Section 811(c)) occurred, it is submitted that it took place when the joint tenancies were first created—not in November, 1943, twenty years after the event; but respondent did not assert, the evidence did not show, and the Tax Court did not find or hold that any such transfer was made in contemplation of decedent's death. In each succeeding property acquisition or investment with the proceeds of such joint tenancy property, the wife obviously furnished one-half the consideration. Therefore if the bonds could be regarded as jointly held property under I. R. C., Section 811(e)(1), either by an application thereof retroactively to the time of the execution of the agreement or because the joint registration thereof was not changed during decedent's lifetime, or on any other theory, one-half of the value thereof was excluded from the gross estate by the express language of the section.

If the transaction in which the agreement was executed is viewed as one effecting a transfer from decedent to his wife in consideration of a transfer from her to him it is only the value of the interest transferred by him which could possibly be included in his gross estate under Section 811(c). If he received nothing he transferred nothing, and the maximum value which could have been included in decedent's gross estate under I. R. C., Section 811(c) was zero. If he received anything of value by way of transfer from his wife, the value of what he received was commensurate with (or in excess of) the value of what he transferred, and his transfer was one for a full and adequate consideration in money's worth. If on any theory the value of the consideration received by decedent was not exactly commensurate with that which he gave, only the excess of the value of the interest transferred by him over the value of the interest received by him could be includible in his gross estate as a transfer in contemplation of death, Reg. 105, Sec. 81.15; and if there was any difference between the values, decedent's wife actually gave up more than she received since her survivorship right was of greater value than the value of his similar right because of her greater life expectancy—which was convincingly established by the fact that she did survive him. There would therefore be no excess value includible in his gross estate under said regulation.

The Tax Court held that at most the division of the two estates constituted "an exchange" and that Section 811(c) does not include "exchange," and therefore it could not fall within the section relative to a sale for a full and adequate consideration in money or money's worth. In so holding it patently appears that the Tax Court gives no consideration to the use by Congress of the words "money's worth."

In *Hale v. Helvering* (1936 App. D. C.), 85 F. 2d 819, the Court said:

> " 'The word "sell" . . . in its ordinary sense means a transfer of property for a fixed price in money *or its equivalent.*' United States v. Benedict (C. C. A.), 280 F. 76, 80.
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> * * * * * * * *
>
> " 'The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money which is but the representative of value of property. Com. v. Clark, 14 Gray (Mass.) 367.' Black's Law Dictionary, 3rd ed. 713." (P. 821.) (Our emphasis.)

In *Ferguson v. Dickson* (1924, C. C. A. 3), 300 Fed. 961, it was said:

> " 'Every transfer of property for an equivalent is practically and essentially a sale, and * * * money's worth is a valuable consideration (for the sale) as much as money itself.' Huff v. Hall, 56 Mich. 456, 23 N. W. 88." (P. 963.)

Because the word "exchange" does not appear in Section 811(c), the Tax Court is saying the transaction is not excepted from the application of the section. We submit this is an untenable thesis. If Congress in enacting Section 811(c) had not contemplated that there would

occur transfers of property for consideration other than money, there would have been no necessity for the use of the term "money's worth." The irresistible conclusion is that the term "money's worth" connotes an exchange and means an exchange. Statutory interpretation compels the giving of meaning to all the language used and it is inconsistent to fail to give consideration to the words "money's worth." In this case it clearly appears that the transaction constituted a sale for an adequate and full consideration in money's worth. If a sale is effected for money's worth, as distinguished from money, of necessity it means an exchange.

Furthermore, the evidence showed and the Tax Court found that the division of the properties on November 24, 1943, was the result of suggestions of decedent's and his wife's attorney. [Tr. 195, 99.] Under such circumstances the requisite motive under Section 811(c) cannot be imputed to decedent.

Estate of Stinchfield, supra.

The deficiency notice of respondent included the United States Savings Bonds in decedent's gross estate under both Sections 811(c) and 811(e), I. R. C. By virtue of the stipulation and findings of the Tax Court, the only provision of Section 811(e) here involved is 811(e)(1). However, the deficiency notice did not so specify. It has been shown that such bonds were not includible under Section 811(c) for the reasons above stated.

There then remains respondent's contention that the bonds were includible under Section 811(e)(1).

The Tax Court sanctioned the inclusion of the value of Mrs. Sullivan's interest in the bonds under I. R. C., Section 811(e)(1). This is apparent from the observations of

the Court concerning her contribution to the acquisition of the joint tenancy properties. [Tr. 112-113.] The contribution of the surviving spouse is not material in considering the application of I. R. C., Section 811(c), but it is expressly made so by the language of I. R. C., Section 811(e)(1). However, there was no joint tenancy property in existence at the time of decedent's death, so I. R. C., Section 811(e)(1) was not applicable. The Court held it applicable upon the circuitous and novel theory that decedent made a transfer in contemplation of his death under I. R. C., Section 811(c), that the effect of that section was to avoid the "transfer" and leave the property in the same category it occupied before the "transfer" was made (*i. e.,* joint tenancy property), and that I. R. C., Section 811(e)(1), in view of its provisions relative to contribution, subjected the entire value of the property to tax. The authority relied on by the Court was a sentence appearing in the opinion of the Court in *Iglehart v. Comm.* (C. C. A. 5, 1935), 77 F. 2d 704. [Tr. 112.] The case cited does not support the theory of the Tax Court in the case now on review. In the *Iglehart* case the Court held that certain transfers were *taxable as transfers in contemplation of death* under Section 302(c) of the Revenue Act of 1926, *not as jointly held property* or otherwise. Also the language of the opinion now relied upon by the Tax Court had reference solely to the subject of *valuation* of properties transferred in contemplation of death. There is nothing in the *Iglehart* case which authorizes the Tax Court to avoid a "transfer" under I. R. C., Section 811(c), and then to tax the "transferred" property under I. R. C., Section 811(e)(1), as the Court attempts to do here.

I. R. C., Section 811, specifies what property interests are includible in a decedent's gross estate and are subject

to estate taxes. Each of the numerous subsections covers specified interests, transfers and other acts subject to tax. The form of the various subsections read in conjunction with the first paragraph of the section, is the same. Section 811(e)(1) is a *taxing* section, as the Tax Court implicitly holds. Therefore, we submit, Section 811(c) is also a *taxing* section—not an *avoiding* section. One of the vicious effects of what the Tax Court has done in this case is to import into Section 811(e)(1), the presumption and other unique provisions of Section 811(c), and to import into Section 811(c) the contribution and tax-imposing provisions of Section 811(e)(1). This might or might not be good tax policy, but we submit that it is for Congress and not the Tax Court to crystallize it into law. As Professor Griswold has well said (*Cases and Materials on Federal Taxation,* 2d Ed., p. 14):

> "There is no use in thinking great thoughts about a tax problem unless the thoughts are firmly based on the controlling statute."

Respondent should not be permitted to attempt to tax property under a plurality of sections. If it is taxable, it is so by virtue of one of the subsections of I. R. C., Section 811, and not a number of them. If it is not taxable under Section 811(c), and we believe this is clear, then it is not taxable under any other section and respondent's alternative attempt must fail.

Estate of Nathalie Koussevitsky (1945), 5 T. C. 650.

If the agreement of November 24, 1943, did not effect a transfer in contemplation of death, then it was effective for all purposes including tax purposes. That agreement was effective immediately upon execution, and one result was a severance of the joint tenancy in the bonds. By the destruction of the unity of title, a tenancy in common was effected and the interests of decedent and his wife commuted. At decedent's death only the one-half belonging to him held as a tenant in common constituted property owned by him and includible in his estate. That one-half was included in the estate tax return. *(Estate of Mary C. Milner, supra.)* It is noteworthy that the Tax Court found as a fact that these bonds, prior to November 24, 1943, were held in joint tenancy, that the Court then held that after the performance of the agreement decedent had only tenancy in common property. [Tr. 99, 109.]

According to respondent's Regulations, Section 811 (e)(1) applies to all classes of property where the survivor takes the entire interest by right of survivorship and no interest therein forms a part of decedent's estate for purposes of administration. *"It has no reference to properties held by decedent and any other person or persons as tenants in common."* (Reg. 105, Sec. 81.22.) Here there existed no survivorship rights; they were relinquished by decedent and his spouse prior to his death. One-half of the total value of the bonds was a part of decedent's estate, administered therein, and the property was held as a tenancy in common at the date of his death.

Clearly, therefore, under the language of Section 811 (e)(1), respondent's Regulations and the Tax Court's own determination that decedent received a half interest as a tenant in common, only one-half of the value of the bonds held by decedent as tenant in common is includible in his gross estate, not under either Section 811(c) or Section 811(e)(1) but under Section 811(a).

Estate of Irwin A. Smith (1941), 45 B. T. A. 59, and

Merry M. Dennis, Executor, v. Com'r (1932), 26 B. T. A. 1120.

D. Only One-half of the Value of the Properties, Exclusive of the United States Savings Bonds, Affected by the Agreement Was Includible in Decedent's Gross Estate.

What has heretofore been said concerning the impropriety of including in decedent's gross estate more than one-half of the value of the United States Savings Bonds is equally applicable to the remainder of the properties affected by the agreement of November 24, 1943, and little need be added to the previous discussion except to point out again that the sole ground upon which respondent sought to justify the inclusion in the gross estate of more than one-half of the value of such remaining properties was that decedent had made a transfer in contemplation of death. Respondent did not claim, as he did with respect to said bonds, that the additional one-half value was includible in the gross estate as joint tenancy property

or otherwise under Section 811(e)(1) of the Internal Revenue Code. However, the bonds, as well as the other property, were, in fact, tenancy in common property at the date of the death of the decedent, as the Tax Court recognized in its opinion, and the Tax Court treated all of the property covered by the agreement alike. [Tr. 109.]

At the time of his death, only a nominal balance remained in the bank account opened by decedent's wife in her name on December 20, 1943, but this fact is not shown in the record. Petitioner therefore concedes that upon the facts shown by the record, one-half of the $2,400 withdrawn from the account, namely, the $1,200 interest of decedent as a tenant in common, was held by Mrs. Sullivan in trust for her husband and might have been includible in decedent's gross estate under I. R. C., Section 811(a). However, respondent has not asserted in his notice of deficiency or otherwise, that such one-half was includible in the gross estate except as property transferred in contemplation of death under I. R. C., Section 811(c); and the Tax Court held that it was includible as jointly held property under Section 811(e)(1) although the account was in the name of decedent's wife only at the time of decedent's death and was then owned by the spouses as tenants in common. We submit, therefore, that for purposes of this case the $2,400 withdrawal is to be treated in the same manner as any of the other property, exclusive of United States Savings Bonds, covered by the agreement.

It is clear from what has been said that in sanctioning the inclusion in the gross estate of the value of the interest

of decedent's wife in the properties, other than the bonds, affected by the agreement, the Court erred in the same particulars as it did with reference to the bonds.

E. Burden of Proof.

The two-year presumption established by I. R. C., Section 811(c), applies only in cases where *decedent* has made a *transfer* of a material part of *his* property. Here no transfer was made; or if one was made, not more than a one-half interest in the joint tenancy properties was transferred by decedent, for he had no power to transfer his wife's interest. Also the presumption, if applicable at all, was dispelled by the evidence which established conclusively that decedent transferred nothing to his wife in contemplation of his death.

Also, the Tax Court upheld the imposition of the tax under I. R. C., Section 811(e)(1), which contains no provisions relative to presumptions.

Finally, petitioner clearly satisfied the general burden of proof requirements. He introduced substantial evidence and it was not impeached or controverted. Respondent called no witness and introduced no evidence, and the evidence was not in conflict.

The Tax Court was therefore in error in holding that petitioner failed to establish error in the action of respondent in treating the "transfer" (if any) to decedent's wife by severance of joint tenancy as having been made in contemplation of death. [Tr. 107.]

IV.

The Tax Court Erred in Failing to Find and to Hold That Respondent Is Estopped and Precluded by His Notice of Deficiency From Assessing Any Deficiency Based Upon His Inclusion in the Gross Estate Under I. R. C., Section 811(e), of Any Property Other Than the United States Savings Bonds.

The only statutory ground asserted by respondent in his notice of deficiency for subjecting to tax any of the property given to Floyd K. Sullivan, or any interest in excess of one-half thereof in the remainder of the properties involved, other than the United States Savings Bonds, was I. R. C., Section 811(c).

It is submitted that the respondent is bound by his notice and should be estopped and precluded from assessing a deficiency under I. R. C., Section 811(e)(1), with reference to any of the properties involved other than the United States Savings Bonds.

Conclusion.

It is respectfully submitted that for the foregoing reasons the decision of the Tax Court should be reversed (26 U. S. C. A., Sec. 1141(c)(1)), and that petitioner should be awarded his costs (28 U. S. C. A., Sec. 1920).

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APPENDIX.

Provisions of Internal Revenue Code involved in this proceeding are as follows:

"§811. Gross estate.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States. . . ." (§811 (Preamble), I. R. C.; 26 U. S. C. A., §811.)

"(a) Decedent's interest. To the extent of the interest therein of the decedent at the time of his death;" (§811(a), I. R. C.; 26 U. S. C. A., §811(a).)

* * * * * * * *

"(c) Transfers in contemplation of, or taking effect at death. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have

been made in contemplation of death within the meaning of this subchapter." (§811(c), I. R. C.; 26 U. S. C. A., §811(c).)

* * * * * * * *

"(e) Joint and community interests.

"(1) Joint interests. To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided, further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants." (§811(e)(1), I. R. C.; 26 U. S. C. A., §811(e)(1).)